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Chenna Gounder a/l Kandasamy v Angamah a/p Sunappan

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22NCVC-77–05 OF 2015

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MOHD NAZLAN JC

11 MAY 2016

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Civil Procedure — Probate — Contentious probate proceedings — Conflicting wills — Burden of proving due execution and testamentary capacity — Burden to dispel any suspicious circumstances — Burden to dispel undue influence, fraud and forgery — Whether subsequent will prevailed over earlier will — Whether both wills invalid — Rules of Court 2012 O 71 r 38, O 72 r 2(2) and r 12

D

Succession — Probate — Validity of will — Conflict of wills — Burden of proving due execution and testamentary capacity — Burden to dispel any suspicious circumstances — Burden to dispel undue influence, fraud and forgery — Whether subsequent will prevailed over earlier will — Whether both wills invalid

E

Succession — Probate — Validity of will — Formalities — Whether failure to provide for the appointment of executor or trustee renders will invalid — Whether failure to date renders will invalid — Whether will must be prepared or witnessed by lawyers — Wills Act 1959 ss 2 & 5

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The deceased, Mr Kandasamy a/l Veerappan ('the deceased') passed away on 20 August 2013. The deceased was survived by his wife ('the defendant'), three sons (of whom the plaintiff was the eldest) and one daughter. A will dated 20 November 2012 was said to have been made by the deceased ('the first will') concerning only one piece of landed property in favour of the plaintiff ('the said property'). A second will dated 14 February 2013 was said to have been also made by the deceased disposing of all his assets, inclusive of the said property to the defendant. The plaintiff had petitioned to the court for the grant of probate based on the first will and this was resisted by the defendant who contended that the deceased had made the second will subsequent in time, thus revoking the first will. As such, parties were directed under O 71 r 38 of the Rules of Court 2012 to proceed on the basis of a contentious probate under O 72 rr 2(2) and 12. The plaintiff contended that the second will had not been prepared by a law firm as it was also not witnessed by a lawyer and that it was essentially done on the instruction of DW6, the youngest son by reason of his intention to withdraw the deceased's fixed deposit. The defendant on the other hand contended that the deceased had been admitted to hospital from

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19–22 November 2012 and hence could not have executed the first will. The surgeon ('PW3') confirmed that the deceased had been operated on for papillary thyroid cancer on 20 November 2012. The defendant therefore argued that the deceased could not have attended at the law firm of PW1 to sign the first will on 20 November 2012 as contended by the plaintiff. The plaintiff responded by claiming that the deceased had actually signed the first will on 19 November 2012, a day earlier than stated, where he visited the law firm of PW1 before going to the hospital, although the first will was dated the following day on 20 November 2012. The first will was witnessed by PW1 and PW2 who testified that the deceased had signed the first will on 19 November 2012 but the will was only dated the day after because payment was only made on 20 November 2012 when the first will was collected by the plaintiff. As for the second will, it was witnessed by DW3 and DW4 who testified that the second will was executed by the deceased at the house of the deceased after DW3 had explained to him the contents of the same. It is claimed that the second will was drafted by a lawyer ('DW2') who had not done any work for the deceased prior to that.

Held, dismissing the plaintiff's claim and the defendant's counterclaim:

(1) In relation to the first will, prima facie there appeared to be full compliance with the provisions of s 5 of the Wills Act 1959 ('the Act'). It was obviously made in writing, bore a signature purported to be that of the deceased and those of the requisite number of two witnesses, both of whom testified at trial as PW1 and PW2. Even though the first will did not provide for the appointment of an executor or trustee, this did not constitute any form of departure from the requirements of the Act which does not make such appointment mandatory. The first will also met the definition of 'will' in s 2 of the Act. (see paras 19–20).

(2) The testimony given by PW1 and PW2 on the specific issue of the date was not consistent with two legal documents (the affidavits and the contemporaneous first will). The explanation for the inconsistency was neither satisfactory nor acceptable. The evidence proffered by the plaintiff, being the propounder of the first will fell considerably short of anywhere near even half of the suspicious circumstances being removed by the plaintiff. The first will could therefore have been actually dated on 20 November 2012 which meant that it had not been executed by the deceased who could not have come to the office on the day he was admitted to hospital. As such, since the plaintiff as the propounder of the first will had patently failed to dispel this particularly suspicious circumstance surrounding the making of the first will, exacerbated by the conflicting, if not downright untrue evidence given by PW1 and PW2 especially when tested against contemporaneous legal documents, the first will could not be accepted as the last will of the deceased and was plainly not valid (see paras 29 & 32).

(3) Prima facie, the second will appeared to have been executed in compliance with the formalities mandated by s 5 of the Act. There is no legal requirement that a will must be prepared, or even witnessed by lawyers. The non-witnessing by DW2, despite having prepared of the second will by itself did not necessarily affect the validity of execution or give rise to a suspicious circumstance concerning its making (see paras 33–34).

(4) The totality of evidence starkly revealed overwhelmingly suspicious circumstances concerning the making of the second will. These include questions on the true extent of the involvement of DW2 in the making of the second will despite not being a witness, DW2's willingness to accede to a rare request to provide a personal guarantee on the strength of the second will, the unexplained non-reference to the second will in the private caveat application by the defendant, the uncommon clause in the second will expressly excluding disposition to any of the testator's children, and the obvious and many discrepancies in the testimony of DW6 (who could well be the true beneficiary of the second will) when tested even against the defendant's other witnesses. None of these were satisfactorily explained. Most were not even explained at all. Given the failure and inability of the defendant to even partly dispel the suspicious circumstances, the inescapable and irrefutable conclusion was therefore that the defendant had on a balance of probabilities not proven the validity of the second will. The second will was plainly not free from all suspicious circumstances, instead appeared contrived and thus manifestly could not validly be accepted as the last will of the deceased. Neither the first will nor the second will could under the law be considered as the last will of the deceased. Therefore, the deceased died intestate (see para 44).

[Bahasa Malaysia summary

Si mati, Encik Kandasamy a/l Veerapan ('si mati') meninggal dunia pada 20 Ogos 2013. Si mati meninggalkan seorang balu ('defendan'), tiga orang anak lelaki (yang plaintif ialah anak yang sulung) dan seorang anak perempuan. Suatu wasiat bertarikh 20 November 2012 dikatakan telah dibuat oleh si mati ('wasiat pertama') berkenaan dengan satu bidang tanah sahaja yang memihak kepada plaintif ('harta itu'). Suatu wasiat kedua bertarikh 14 Februari 2013 dikatakan juga telah dibuat oleh si mati yang memberikan kesemua hartanya, termasuk harta itu kepada defendan. Plaintif telah mempetisyen kepada mahkamah bagi suatu geran probet berdasarkan kepada wasiat pertama dan hal ini telah dibantah oleh defendan yang menyatakan bahawa si mati telah membuat wasiat kedua selepas itu, oleh itu membatalkan wasiat pertama. Oleh yang demikian, pihak-pihak telah diarahkan di bawah A 71 k 38 Kaedah-Kaedah Mahkamah 2012 untuk meneruskan tindakan atas dasar probet bertikaian di bawah A 72 k 2(2) dan k 12. Plaintif menyatakan bahawa

wasiat kedua itu tidak disediakan oleh sebuah firma guaman memandangkan ia tidak disaksikan oleh seorang peguam dan pada dasarnya dibuat atas arahan SD6, anak lelaki bongsu kerana SD6 hendak mengeluarkan simpanan tetap si mati. Defendan pula menyatakan bahawa si mati telah dimasukkan ke hospital pada 19–22 November 2012 dan oleh itu tidak mungkin dapat menandatangani wasiat pertama itu. Pakar bedah ('SP3') mengesahkan bahawa si mati telah dibedah untuk kanser tiroid papilari pada 20 November 2012. Oleh yang demikian, pihak defendan menghujahkan bahawa tidak mungkin si mati hadir ke firma guaman milik SP1 untuk menandatangani wasiat pertama pada 20 November 2012 sebagaimana yang dinyatakan oleh plaintif. Pihak plaintif berhujah balas dengan menyatakan bahawa si mati sebenarnya telah menandatangani wasiat pertama itu pada 19 November 2012, sehari lebih awal dari yang dinyatakan, apabila si mati melawat firma guaman SP1 sebelum pergi ke hospital, walaupun wasiat pertama itu bertarikh hari yang berikutnya pada 20 November 2012. Wasiat pertama itu telah disaksikan oleh SP1 dan SP2 yang telah memberi keterangan bahawa si mati telah menandatangani wasiat pertama pada 19 November 2012 tetapi wasiat itu bertarikh sehari selepas kerana bayaran hanya dibuat pada 20 November 2012 semasa wasiat pertama dituntut oleh plaintif. Bagi wasiat kedua, ia disaksikan oleh SD3 dan SD4 yang memberi keterangan bahawa wasiat kedua telah ditandatangani oleh si mati di rumah si mati setelah SD3 menjelaskan kepadanya kandungan wasiat itu. Wasiat kedua itu dikatakan didraf oleh seorang peguam ('SD2') yang tidak pernah membuat apa-apa kerja untuk si mati sebelum itu.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas defendan:

(1) Berhubung dengan wasiat pertama, secara prima facie terdapat bukti bahawa kehendak peruntukan s 5 Akta Wasiat 1959 ('Akta') telah dipenuhi. Adalah jelas wasiat itu dibuat secara bertulis, mempunyai tandatangan yang dikatakan sebagai tandatangan si mati dan tandatangan dua orang saksi yang dikehendaki, kedua-duanya telah memberi keterangan dalam perbicaraan sebagai SP1 dan SP2. Walaupun wasiat pertama tidak memperuntukkan tentang pelantikan seorang wasi atau pemegang amanah, hal ini tidak terjumlah kepada apa-apa keadaan yang menunjukkan bahawa kehendak Akta yang tidak menjadikan pelantikan itu suatu yang mandatori. Wasiat pertama itu juga telah memenuhi tafsiran 'wasiat' di bawah s 2 Akta (lihat perenggan 19–20).

(2) Testimoni yang diberi oleh SP1 dan SP2 mengenai isu spesifik tarikh tidak konsisten dengan dua dokumen perundangan (affidavit dan wasiat pertama itu). Penjelasan untuk ketidakselarasan itu tidak memuaskan mahupun boleh diterima. Keterangan yang diberikan oleh plaintif, selaku orang yang mengajukan tentang wasiat pertama itu tidak terjatuh dalam mana-mana keadaan meragukan yang diketepikan oleh plaintif. Oleh itu, wasiat pertama itu boleh jadi telah ditandatangan pada

20 November 2012 yang bermakna bahawa ia tidak ditandatangan oleh si mati yang tidak mungkin hadir ke pejabat pada hari beliau dimasukkan ke hospital. Oleh yang demikian, memandangkan plaintif selaku orang yang mengajukan tentang wasiat pertama telah dengan jelasnya gagal untuk mengenepikan keadaan meragukan yang menyelubungi proses pembuatan wasiat pertama, diburukkan lagi dengan keterangan yang bercanggah jika tidak benar sekalipun oleh SP1 dan SP2 terutamanya apabila dibandingkan dengan dokumen perundangan, wasiat pertama itu tidak boleh diterima sebagai wasiat terakhir si mati dan dengan jelasnya tidak sah (lihat perenggan 29 & 32).

(3) Wasiat kedua kelihatan telah disempurnakan menurut formaliti yang diperuntukkan oleh s 5 Akta. Tidak terdapat kehendak supaya suatu wasiat disediakan atau disaksikan oleh peguam. Kegagalan SD2 menjadi saksi, meskipun beliau merupakan orang yang menyediakan wasiat kedua itu dengan sendirinya tidak semestinya memberi kesan kepada kesahan penyempurnaan atau membangkitkan keadaan yang meragukan berkenaan dengan pembuatannya (lihat perenggan 33–34).

(4) Keseluruhan keterangan menunjukkan dengan jelas keadaan meragukan berkenaan dengan pembuatan wasiat kedua itu. Ini termasuklah persoalan tentang kadar penglibatan sebenar SD2 dalam pembuatan wasiat kedua walaupun tidak menjadi saksi, kesanggupan SD2 untuk menerima kepada permohonan yang janggal untuk memberikan suatu jaminan peribadi tentang kekuatan wasiat kedua, rujukan kepada wasiat kedua dalam permohonan kaveat peribadi oleh defendan yang tidak dijelaskan, klausa yang janggal dalam wasiat kedua itu yang dengan jelas mengenepikan pemindahan kepada mana-mana anak pewasiat, dan percanggahan keterangan oleh SD6 yang sangat jelas dan nyata (yang boleh menjadi benefisiari sebenar wasiat kedua) apabila dibandingkan, meskipun dibandingkan dengan saksi defendan yang lain. Tidak ada satu pun perkara-perkara ini diberikan penjelasan yang memuaskan. Kebanyakannya tidak dijelaskan langsung. Disebabkan kegagalan dan ketidakbolehan defendan untuk mengenepikan keadaan yang meragukan, rumusan yang tidak dapat dielakkan ialah defendan telah atas imbangan kebarangkalian tidak membuktikan kesahan wasiat kedua. Wasiat kedua juga tidak lepas daripada keadaan yang meragukan, dan oleh itu tidak dapat diterima dengan sah sebagai wasiat terakhir si mati. Wasiat pertama mahupun wasiat kedua boleh diterima di bawah undang-undang sebagai wasiat terakhir si mati. Oleh itu, si mati telah meninggal dunia tanpa apa-apa wasiat (lihat perenggan 44).]

Notes

For cases on contentious probate proceedings, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8217–8218.

For cases on validity of will, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 2827–2840.

Cases referred to

Banks v Goodfellow [1870] LR 5 QB 549, QBD (refd)
Dr K Shanmuganathan v Periasamy s/o Sithambaram Pillai [1993] MLJU 91; [1994] 2 CLJ 225, HC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (refd)
Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors [2005] 6 MLJ 540, CA (refd)
Ng Boo Bee v Khaw Joo Choe [1916] 14 SSLR 90, CA (refd)
Tan Chong & Sons Motor Co (Sdn) Bhd v Alan Mc Knight [1983] 1 MLJ 220, FC (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2002] 4 MLJ 97; [2002] 4 CLJ 90, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Udham Singh v Indar Kaur [1971] 2 MLJ 263, FC (refd)
Will of PM Framroz, Dec'd; SF Framroz & Anor v The Chartered Bank (M) Trustee Ltd & Anor, Re [1972] 1 MLJ 43, CA (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92
National Land Code Form 19B
Penal Code ss 191, 192
Rules of Court 2012 O 71 r 38, O 72 rr 2(2), 12
Wills Act 1959 ss 2, 5

TS Chang (Henry Soong & Chang) for the plaintiff.
TH Ang (R Vasanthan with him) (Julie Lim Vasanthan & Co) for the defendant.

Mohd Nazlan JC:

INTRODUCTION

[1] This case involves a writ action filed by the plaintiff son against his defendant mother, for a grant of probate concerning a will dated 20 November 2012 said to have been made by his deceased father (also husband to the defendant) ('the first will'), at the same time challenging the validity of a subsequent will dated 14 February 2013 ('the second will'), and a counterclaim by the defendant for probate of the second will, pleading the invalidity of the first will. After full trial, I decided that both wills are not valid and ruled that the

deceased had died intestate. This judgment contains the full grounds for my decision.

KEY BACKGROUND FACTS

[2] The deceased, Mr Kandasamy a/l Veerappan passed away on 20 August 2013, and is survived by his wife (the defendant), three sons (of whom the plaintiff is the eldest), and one daughter. The first will concerned only one piece of landed property in favour of the plaintiff ('the said property') and the second will sought to dispose of all the assets of the deceased, inclusive of the said property.

[3] The plaintiff had originally petitioned to the court by way of an originating summons for the grant of probate based on the first will. This was resisted by the defendant who contended that the deceased had made the second will subsequent in time, thus revoking the first will. As such, parties were directed under O 71 r 38 of the Rules of Court 2012 ('the RC 2012') to proceed on the basis of a contentious probate under O 72 rr 2(2) and 12 of the RC 2012 which provide that a contentious probate shall be begun by writ and a defendant having a claim thereto may file a counterclaim in respect thereof.

THE TRIAL AND THE WITNESSES

[4] At trial, which took place for two days on 29 October 2015 and 2 November 2015, the following witnesses were called by the plaintiff and testified to give evidence:

(a) Parthiban a/l M N Letchumanan, a senior lawyer ('PW1');

(b) Malar a/p Samydurai, a clerk at PW1's law firm ('PW2');

(c) Dr Sarojah a/p Arulanathan, a surgeon ('PW3');

(d) Mizarina bt Bakrim, an administrative assistant at Hospital Sultan Ismail Johor Bahru ('PW4');

(e) Chenna Gounder a/l Kandasamy, the plaintiff ('PW5'); and

(f) Selvakumaran a/l Kandasamy, the plaintiff's brother ('PW6').

The plaintiff had also intended to call a handwriting expert but after having given time and adjournment for the latter to complete his report by the court, which was not forthcoming even well after the close of the defence, the plaintiff agreed not to pursue the same.

[5] The following witnesses gave evidence for the defendant:

(a) Siti Salmah bt Suliman, a bank officer ('DW1');

(b) Shangugiah Thever Selvarani, a lawyer ('DW2'); A

(c) M Subramaniam a/l Muthusamy, the deceased's nephew ('DW3');

(d) Ettikan a/l Muthusamy, the deceased's nephew ('DW4');

(e) Angamah a/p Sunappan, the defendant ('DW5'); and B

(f) Logenathan a/l Kandasamy, the deceased's youngest son ('DW6').

THE PRINCIPAL PLEADED CASE OF THE PARTIES

[6] The plaintiff contended that the first will was valid and the second will C not valid. The defendant maintained the diametrically opposite position. Indeed, the pre-agreed issues for trial were helpfully defined by the parties, which in turn greatly provided better focus of the proceedings, simply as follows:

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(a) whether the first will was valid; and

(b) whether the second will was valid.

In other words, the court is to determine which of either the first will or the E second will is valid, if at all; for if neither is, the deceased must have died intestate, without any will.

[7] The key challenge put forward by the plaintiff on the second will dated 14 February 2013 was that the signature which appeared on the same was not F that of the deceased. But this argument was not pursued given the unavailability of the handwriting expert to testify. It was further alleged that the second will had not been prepared by a law firm as it was also not witnessed by a lawyer and that it was essentially done on the instruction of DW6, the youngest son by reason of his intention to withdraw the deceased's fixed G deposit.

[8] The defendant on the other hand anchored its repudiation of the first will dated 20 November 2012 on account of the fact that the deceased had been admitted to hospital from 19–22 November 2012 and could not have executed H the same, and that in any event, given the rule that a later will must take precedence over an earlier one, the second will, being the one executed subsequent to the first will, must clearly prevail.

THE LEGAL PRINCIPLES ON THE BURDEN OF PROOF OF DUE I EXECUTION

[9] Whilst it is a general common law principle of universal application that a plaintiff in a civil proceedings must prove his case on a balance of

probabilities, in relation to the law of wills and testamentary disposition, it is equally well established that when a person challenges a will, like the plaintiff vis a vis the second will, and the defendant in relation to the first will, it is the person who proposes the will or otherwise known as the propounder of the will, or the plaintiff and the defendant in respect of the first will and the second will, respectively, who bears the *onus probandi* or the burden of proof to show that there was due execution and testamentary capacity in respect of the first will and the second will, as the case may be, as well as to dispel any suspicious circumstances surrounding the making of the same. Only after this is established by the said pertinent party in adducing relevant and admissible evidence to the satisfaction of the court, would the plaintiff then be required to prove vitiating aspects of extraneous nature such as undue influence, fraud and forgery of the second will. The same rule governs the challenge of the first will by the defendant in her counterclaim.

[10] It would be remiss of me not to make reference to the following passage in the judgment of Steve Shim CJ (Sabah and Sarawak) in the Federal Court case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 which most instructively gives emphasis to the applicable burden of proof in the context of a challenge to a will:

> As regards the burden of proof, the Court of Appeal quite rightly stated the settled law ie, that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will. In this connection, we find the approach taken by the High Court of Australia in *William Henry Bailey & Ors v Charles Lindsay Bailey & Ors* [1924] 34 CLR 558 to be instructive. Therein Isaacs J said, inter alia:
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> (1) The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged, the court is bound to pronounce against the instrument.
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> (2) This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence.
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> (3) The proponent's duty is, in the first place, discharged by establishing a *prima facie* case.
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> (4) A *prima facie* case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the Court judicially that the will propounded is the last will of a free and capable testator.
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> (5) A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments.

(6) The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the Court varies with the circumstances.

(7) As instances of such material circumstances may be mentioned (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit.

(8) Once the proponent establishes a *prima facie* case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the onus *probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof.

(9) To displace a *prima facie* case of capacity and due execution, mere proof of serious illness is not sufficient: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing his property.

(10) The opinion of witnesses as to the testamentary capacity of an alleged testator is usually for various reasons of little weight on the direct issue.

(11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions.

[11] The leading and authoritative text of *Sarkar on Evidence* (18th Ed, Reprint 2014) Vol 2 at p 1982 also clarifies the position as follows:

> Wills —The law has been thus stated in two well-known cases: These rules are two; first, that the onus *probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is that last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased (*Barry v Butlin* (1938) 2 Moo PC 480, 482; 46 RR 123 (relied on and explained in *Harmes v Hinkson* AIR 1946 PC 156; 50 CWN 895) and *Tyrrel v Painton* 1894 PD 151; 10 LT 453. See *Suryanarayana v Suramma* AIR 1947 PC 169; *Bai Gangabai v Bhagwan* 29 B 530 PC; 9 CWN 769; *Gomtibai v Kanchhedilal* AIR 1949 PC 272).

[12] In respect of the issue of due execution, it is manifest that the statutory requirements stipulated in the Wills Act 1959 must be adhered to. Of relevance

A are the provisions of s 5 of the same which concern the mode of execution. Given its importance, the entirety of the requirements of s 5 is reproduced hereunder, as follows:

> (1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.
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> (2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary:
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> Provided that every will shall, as far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid under this section if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance —
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> (a) that the signature shall not follow or be immediately after the foot or end of the will;
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> (b) that a blank space shall intervene between the concluding word of the will and the signature;
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> (c) that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses;
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> (d) that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature; or
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> (e) that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature,
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> and the enumeration of the above circumstances shall not restrict the generality of this proviso; but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

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[13] It is thus plain that the formal statutory requirements for due execution essentially stipulate that the will must be in writing, and the format be followed, and the execution by the testator and the signing of the witnesses in attendance must also be done in the stated fashion.

[14] As for the issue of testamentary capacity, the leading common law authority is the English case of *Banks v Goodfellow* [1870] LR 5 QB 549 where Cockburn CJ stated instructively as follows:

> It is essential to the exercise of such power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[15] The former Federal Court in the case of *Udham Singh v Indar Kaur* [1971] 2 MLJ 263 had followed this case as can be seen in the following passage of the judgment of court delivered by Ismail Khan CJ (Borneo):

> A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made (*Banks v Goodfellow* (1870) LR 5 QB 565).

[16] In relation to the issue of suspicious circumstances, clarification has been made by the Court of Appeal on the same in the case of *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ 90, whereby it was stated as follows:

> If a will was prepared and executed under circumstances which raised a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. Another instance is where the person was active in procuring the execution of the will under which he takes a substantial benefit by, for instance, suggesting the terms of the will to the testator and instructing a solicitor chosen by that person.

[17] In an earlier decision of the High Court in *Dr K Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1993] MLJU 91; [1994] 2 CLJ 225, reference was made to Indian authorities in explaining the element of suspicious circumstances, which were simply described in the following manner:

> What excites a court's suspicion, I think, was very well expressed as 'A circumstances would be 'suspicious' when it is not normal or is not normally expected in a normal

A situation or is not normally expected of a normal person', see *Indu Bala Bose & Ors v Manindra Chandra Bose & Anr* [1982] AIR 133 at p 134.

[18] The law in this country is thus well settled that when a plaintiff challenges a will, the propounder must first on a balance of probabilities prove the due execution and testamentary capacity, as well as dispel any suspicious circumstances relating thereto, having regard to the case-law authorities I have stated. If successfully established, it would thus then be on the plaintiff to prove matters deemed more external to the making of the will, such as undue influence, fraud and forgery. In respect of proving undue influence in the making of a will, which, I again emphasise would only become relevant if the propounder has first successfully established the validity of the will, the following passage from the judgment of the Jeffrey Tan J (as he then was) in *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 (affirmed by the Court of Appeal in *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal* [2005] 6 MLJ 540) is of significance:

> Sir JP Wilde in *Hall v Hall* (1868) LR 1 P & D 481 at p 482 defined undue influence as follows:
>
> > Pressure of whatever character ... if so exercised as to overpower the volition without convincing the judgment.
>
> Viscount Haldane in *Craig v Lamoureux* [1920] AC 349 at p 357 explained it as follows:
>
> > ... Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which does not express his mind, but something else which he did not really mean.
>
> There is a difference between undue influence as understood in probate and in equity. In equity, persons standing in certain relationships to others are liable to have undue influence presumed against them in relationship to certain transactions. In probate, undue influence cannot be presumed (*Parfitt v Lawless* (1872) LR 2 P & D 462 at p 468; 'there must be coercion ... it is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence' (*Wingrove v Wingrove* (1885) 11 PD 81 at p 82).
>
> Undue influence is not bad influence but coercion (*Williams v Goude* (1828) 1 Hag Ecc 577 at pp 581, 596). Persuasion and advice do not amount to undue influence so long as the free volition of the testator to accept or reject them is not invaded (*Parfitt v Lawless* at p 474). Appeals to affection, ties of kindred, gratitude for past services, or pity for future destitution are legitimate; but not pressure exerted to overpower the volition without convincing the judgment (*Hall v Hall*). There is no undue influence unless the testator is in such a condition that if he could speak his wishes would say 'this is not my wish but I must do it' (*Baudains v Richardson* [1906] AC 169 at p 184).
>
> Strictly, to upset a will, the undue influence must be shown to have been exercised

in relation to the will itself. Where, however, there is evidence that the testator was so far under the influence of persons benefiting from his will that he was not a free agent, the conclusion may be warranted that undue influence was exercised in relation to the will, even if there is no direct evidence (*Boyse v Rossborough* (1857) 6 HLC 2 at p 51).

Those alleging undue influence must prove it. It is not sufficient to show the circumstances attending the execution are consistent with its having been procured by undue influence. It must be show that they are inconsistent with any other hypothesis (*Boyse v Rossborough* at p 5). Even if the power to overbear the will of the testator is admitted, it must be shown to overbear the will of the testator is admitted, it must be shown that such power was exercised, and the circumstances of the execution are inconsistent with any other view but undue influence (*Craig v Lamoureux* [1920] AC 349. Nevertheless in many cases in which the court has not been satisfied that there was undue influence, and even in cases where undue influence has been positively disproved, the court has pronounced against the will propounded because the circumstances have excited its suspicion and vigilance, and it has not been satisfied as to the righteousness of the transaction (*Barry v Butlin* (1838) 2 Moo PC 480; *Fulton v Andrew* (1875) LR 7 HL 448; *Re Harley, Hartley v Fuld (Fuld intervening) (No 3)* [1965] 3 All ER 776).

I shall next examine the evidence and apply the law to the same.

EVALUATION AND FINDINGS OF THIS COURT

The first will

[19] On the face of the document that is the first will, I am of the view that prima facie there appears to be full compliance with the provisions of s 5 of the Wills Act 1959. It was obviously made in writing, bore a signature purported to be that of the deceased and those of the requisite number of two witnesses, both of whom testified at trial as PW1 and PW2. I should add that even though the first will did not provide for the appointment of an executor or trustee, this does not constitute any form of departure from the requirements of the Wills Act 1959 which does not make such appointment mandatory.

[20] Further, in my assessment, the first will meets the definition of 'will' in s 2 of the Wills Act 1959 which requires that it contains a declaration intended to have legal effect of the intentions of a testator with respect to his property. The first will clearly provides for the intended distribution of the relevant property held under Geran 24086, Lot 3500, Mukim Plentong, Daerah Johor Bahru (which was the said property) in favour of the plaintiff, being the deceased's son who together with the deceased had built a temple on the said property and looked after the same thereafter. This intention to benefit the plaintiff is both believable as well as reasonable taking into account the evidence given by, apart from the plaintiff himself, his brother PW6, PW2,

being the clerk for PW1 and crucially that of the defendant herself, being the mother of the plaintiff. During cross-examination, the defendant agreed that the deceased, being her late husband, trusted the plaintiff to look after the temple situated on the said property. The notes of proceedings (at p 87) recorded the following on the point during cross examination of the defendant:

> TS Chang: Setuju dengan saya tak bahawa mendiang suami kamu memang nak pastikan bahawa kuil itu terus berada di atas tanah dan terus dijaga?
>
> Angamah: Benar.
>
> TS Chang: Dan ini merupakan salah satu mendiang suami kamu punya hasrat terakhir walaupun selepas dia telah meninggal. Dia inginkan kuil tu berterusan. Betul?
>
> Angamah: Benar.
>
> TS Chang: Dan saya katakan pada kamu bahawa suami kamu memang percaya dengan anak sulung kamu iaitu Chenna untuk terus jaga kuil itu. Betul?
>
> Angamah: Benar.
>
> TS Chang: Saya juga cadangkan bahawa mendiang suami kamu memang percaya dengan Mr Chenna. Betul?
>
> Angamah: Benar.

[21] This declaration of intention of the deceased is also in my view in congruence with the principles expressed by the Singapore Court of Appeal in the case of *Re Will of PM Framroz Decd; SF Framroz & Anor v The Chartered Bank (M) Trustee Ltd & Anor* [1972] 1 MLJ 43 where Winslow J stated as follows:

> We mention some of these background facts because of the claim that the will must be construed having regard to the relevant circumstances when the testator made his will including, as Lord Atkin at p 414 of *Perrin v Morgan* [1943] AC 399 said:
>
> > ... the age and education of the testator, his relations to the beneficiary chosen, whether of kinship or friendship, the provision for other beneficiaries and other admissible circumstances.
>
> As Lord Atkin also said:
>
> > ... the construing court has to ascertain what was meant, being guided by the other provisions of the will and the other relevant circumstances.
>
> Lord Romer also said in the same case:
>
> > ... a will should be so construed as to give effect to the intention of the testator such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed, the court is entitled, to use a familiar expression, to sit in the testator's arm-chair.
>
> The question for this court is therefore, as Viscount Simon LC said at p 406 of the same case:

> not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case — what are the 'expressed intentions' of the testator.

In order therefore to adjudicate upon the matter, after considering the language of the will and all the relevant circumstances, the construing court must adopt what appears the most probable meaning of what the testator has said by means of the written words he has used. In short, what are the expressed intentions of the testator? It must be remembered that Lord Romer in the same case at p 420 said that, when seated in the testator's arm-chair:

> ... the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said.

because the general rule as stated by *Jarman, on Wills*, Vol 3, 8th Ed at p 2070 at Rule XVI is that:

> ... words are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another can be collected and that other can be ascertained.

[22] In relation to the first will however, there was no issue of testamentary capacity, apart from the point about the physical health of the deceased and his hospital admission which must have negated his attendance at the office of PW1 to sign the first will on 20 November 2012. As stated earlier however, the key argument of the defendant is that the first will could not have been executed by the deceased on 20 November 2012 because on that day, as confirmed by the evidence of the surgeon PW3 that the deceased had been admitted to Hospital Sultan Ismail Johor Bahru, and operated for papillary thyroid cancer on that same day. I do not think parties dispute the fact that his admission meant that he could not have executed the first will on 20 November 2012. That was why the plaintiff's version of events was that the deceased actually signed the first will on 19 November 2012, a day earlier than stated, where he visited the law firm of PW1 before going to the hospital, although the first will was dated the following day on 20 November 2012. This was asserted by the plaintiff himself, based on what he claimed to have been informed to him by the deceased, as well as by PW1 and PW2. PW1, a senior legal practitioner of some 32 years standing testified that his firm prepared the first will for the deceased for which he was one of the two witnesses (and confirmed by his clerk, PW2 as the second witness) and for whom PW1 had acted for since 1995 on various property transactions. Both PW1 and PW2 confirmed that the deceased had signed the first will on 19 November 2012 but the will was only dated the day after because payment was only made on 20 November 2012 when the first will was collected by the plaintiff. The fact of payment made on the date of the first will is further supported by the relevant receipt for RM400 issued by the law firm of PW1 on even date.

[23] The Wills Act 1959 does not mention the requirement to have wills to be dated, although surely dating the same would be a very commonsensical and practical thing to do in order to determine if it is the last will of the testator. Failure to have it dated does not strictly invalidate the will, for other evidence may be adduced to establish date of execution, such as from the witnesses who must according to the Wills Act 1959 witness the signing by the testator. As such, there appears to be little substance to the challenge by the defendant on aspects pertaining to the formalities of due execution and testamentary capacity. The issue of the date of the first will, considering the circumstances of the signing, however, gives rise to one potentially suspicious element concerning the making of the first will, which if not successfully dispelled by the plaintiff, could even result in a version of events that the first will was not even executed by the deceased.

[24] On the one hand, I find that the evidence of PW1, PW2 and the plaintiff are consistent in the explanation that the first will was dated a day after actual execution because the deceased through the plaintiff only made the payment (as shown in the receipt P2) the day after execution when collected by the plaintiff upon request by the deceased. The date per se is in the context of this case, may not be as critical as the fact of execution. Furthermore, as stated earlier, the Wills Act 1959 does not provide any requirement pertaining to the date of a will. However, on the other hand, both PW1 and PW2 had separately, earlier signed sworn affidavits dated 24 September 2014 in their respective replies to interrogatories (concerning the application for the grant of probate) that the deceased had in fact attended the office of PW1 on 20 November 2012 and were especially specific in mentioning even the time of execution of the first will to be at 9.25 in the morning. Both PW1 and PW2 also affirmed in their respective affidavits that the deceased came to execute the first will with the plaintiff.

[25] I should slightly digress and add that it is a well established rule of evidence as embodied in ss 91 and 92 of the Evidence Act 1950 that no oral evidence is admissible to contradict the terms of a matter required by law to be reduced to the form of a document (as s 5 of the Wills Act 1959 clearly requires a will to be), unless the oral evidence comes within one of the exceptions contained in s 92 (see the former Federal Court decision in *Tan Chong & Sons Motor Co (Sdn) Berhad v Alan McKnight* [1983] 1 MLJ 220 and *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229). Thus, the plaintiff would appear not to be competent to introduce evidence contrary to what was already stated in the first will. This argument was raised by the defendant. However, it should be noted that proviso (a) to s 92 does provide that any fact such as that it is wrongly dated may be proved which would entitle any person to any order. As such, extrinsic evidence is admissible to show that the document was not

executed on the date it purports to bear (see also *Ng Boo Bee v Khaw Joo Choe* [1916] 14 SSLR 90). A

[26] The conflicting versions as asserted by PW1 and PW2 as against the date stated in the first will and the affidavits, to my mind, do not merely excite the suspicion of the court that the plaintiff must now explain, but also immediately raise strong suspicions not just on the date of execution but on whether there was even ever an execution by the deceased of the first will. First, the specific statement on the date of the first will as contained in the affidavits as well as the first will itself, is so clearly in conflict with the evidence given by PW1 and PW2 in court, and secondly, the averment that the plaintiff accompanied and attended with the deceased to the office of PW1 is also not consistent with the evidence given by the plaintiff who testified that he only got to know of the first will subsequent to execution on the alleged date of 19 November 2012 after the deceased asked the plaintiff to collect the will and pay for the services of the firm for its preparation, the day after. B C D

[27] The conflicting evidence in question is one that I find great difficulty in accepting, unless it was convincingly dispelled by the plaintiff, and considering the totality of evidence, represents an irreconcilable difference, for I find the clear and obvious contradictions neither sufficiently nor satisfactorily clarified by even the senior lawyer PW1 and PW2. PW1 stated in evidence during examination in chief that he could not remember the context of the affidavits, and the date of the first will of 20 November 2012 as stated in his own sworn affidavit must have been an error as the date should have been stated as 19 November 2012. This is yet another contradiction because since PW1 had already explained the first will had been deliberately dated 20 November 2012 due to the delay in payment, he could have maintained this version and also asserted that the affidavit mentioned 20 November 2012 for the same exact reason. Yet he said it must have been an error. The reason he said this was in my mind quite clear, for the affidavit contained express and specific averments by PW1 of the statement that the deceased came to the law office of DW1 on 20 November 2012 (as against the averment that the date of the first will being 20 November 2012), and that this averment appeared not once, but thrice in the affidavit of PW1. PW2 was more consistent however, for during re-examination she explained that the date of 20 November 2012 was used even though the deceased came to sign the first will on 19 November 2012 for the same reason as testified earlier, which was that the deceased through the plaintiff could only manage to pay on the 20 November 2012, despite her affidavit containing a statement that the deceased came to the office of PW1 on 20 November 2012. In other words, both employed the same reason for the contradiction, which simply was that the date was entered on to the will only upon payment for the legal services to the firm the day after, with the variation offered by PW1 that the statement in his affidavit was made in error. Whilst the E F G H I

issue of the delay in dating due to non-payment could at first blush seemed genuine, one could also question whether it would be reasonably expected that a client of very many years of relationship to have been treated in the manner that unfolded, especially when the fees was only RM400. On its own, this might not give rise to a suspicious circumstance but it being the reason cited for the crucial question as to when the first will was actually executed had clearly alerted the interest and suspicion of the court. It would thus be on the plaintiff to remove such suspicious circumstances. In my assessment, this he failed to achieve.

[28] Thus, in my view, one would be fully justified in wondering and asking the pointed question as to why, if the different date was genuinely due to the delay in payment, the affidavits by PW1 and PW2 could not have simply described the true position. In PW1's six paragraph affidavit dated 24 September 2014, which context must have already been in contemplation of legal proceedings, the reference by PW1 to 20 November 2012 being interchangeably used as either the date of the first will or the date the deceased came to execute the same could be found in four paragraphs. The deponents deciding instead not to provide an accurate version of events in a sworn affidavit is difficult to countenance. It would indeed be convenient for deponents of affidavits to assert subsequently that the averments made earlier, no matter how specific they may have been in reply to questions in interrogatories, were however affirmed in error, but it must not be lost to them, especially considering the seniority of PW1 in legal practice, that they run the great risk of infringing the provisions of ss 191 and 192 of the Penal Code in respect of the offence of giving false evidence. Even without introducing the threat of penal consequences, the law, as embodied in s 92 of the Evidence Act 1950, is manifest in proscribing admission of oral statement when the terms of any matter required by law to be reduced to the form of a document, which the affidavit in reply to the interrogatories most definitely was one, as would the first will have been.

[29] The testimony given by PW1 and PW2 on the specific issue of the date is not consistent with not one but two legal documents (the affidavits and the contemporaneous first will). The explanation for the inconsistency is in my judgment neither satisfactory nor acceptable. The reason proffered by PW1 and PW2, of the specific averments in the affidavits on the date the deceased came to execute the first will being a mistake or that was to reflect date of actual payment is far too convenient an afterthought. Similarly PW1 (or PW2 if she was the one who actually handled the matter for the firm) could have decided to date the first will on the date it was actually signed, which according to PW1 was 19 November 2012 instead of dating it on the date of payment. PW1 could have dated it on the 19 November 2012 and if non-payment of RM400 by a long standing client who was described by PW2 as 'one of our very good client'

was seriously bothering PW1, he could have just not released the will until payment was made. Instead, the pretext of the delay in payment was introduced, making the explanation convoluted, and bordering on stretching one's credulity, resulting in the version of the plaintiff in respect of the execution by the deceased of the first will to be on the balance of probabilities, decidedly contrived.

[30] This is not to mention that the issue of whether or not the plaintiff accompanied the deceased to attend execution of the first will at the office of PW1 too remains unresolved given the conflicting evidence. The sworn affidavits categorically mentioned the plaintiff accompanying the deceased on the date the latter signed the first will on 20 November 2012, but the same deponents of the affidavits found difficulty repeating in court the averments they had made in the affidavits. PW1 could not remember when asked this question and the version of PW2 was that the deceased came alone. Given such backdrop, the fact that the first will made specific mention of only the said property but made no reference to the other assets of the deceased for distribution despite declaring the same to be his last will could also be construed to further render the situation even more greatly afflicted by suspicious circumstances which are far from being in any justifiable manner dispelled by the plaintiff.

[31] Despite the brevity and simplicity of the first will, one point which stood out, and this was also highlighted by the defendant, was that the first will mentioned the address of the defendant as that of the deceased's, where evidence was quite incontrovertible that the deceased continued living in his own home together with the defendant and youngest son ('DW6'). This issue was however not sufficiently clarified by the plaintiff and further contributed in sowing the seeds of suspicion.

[32] All such circumstances are nothing but suspicious, calling into question the validity of the first will, and whether it had actually even been executed by the deceased. For the reasons I have discussed earlier, the evidence proffered by the plaintiff, being the propounder of the first will fall considerably short of anywhere near even half of the suspicious circumstances being removed by the plaintiff. The first will could therefore have been actually dated on 20 November 2012 which meant that it had not been executed by the deceased who could not have come to the office on the day he was admitted to hospital. As such, since the plaintiff as the propounder of the first will has patently failed to dispel this particularly suspicious circumstance surrounding the making of the first will, exacerbated by the conflicting, if not downright untrue evidence given by PW1 and PW2 especially when tested against contemporaneous legal documents, I have no hesitation in ruling that the first will cannot be accepted as the last will of the deceased and is plainly not valid.

The second will

[33] Having determined the first will to be *not* valid, I now turn to the question on the validity of the second will. Again, it is for the propounder of the will, in this situation, the defendant, to prove the same. Prima facie, on the face of it, the second will too appears to have been executed in compliance with the formalities mandated by s 5 of the Wills Act 1959. Perhaps even more so, when compared against the first will. There is no obvious dispute as to the date, and the document, unlike the first will, even provided for the appointment of an executrix of the will. It bore the deceased's signature and those of two witnesses, both of whom, DW3 and DW4 testified to have been present when the deceased executed the second will at the house of the latter, which took place after DW3 explained about the contents of the same.

[34] Central to establishing due execution, like in the case for the first will, is the role of the lawyer involved in the preparation of the will. It is the case of the defendant however that the second will was indeed drafted by a lawyer, DW2, who had been in practice for 18 years, and according to DW2 herself had not done any work for the deceased before this will drafting assignment. It is not clear why PW1, the deceased's usual lawyer was not asked to undertake this task. The second will itself did not however bear the name of DW2's own law firm despite DW2 agreeing the practice to be otherwise (which is for the will to bear the letterhead of the law firm). Crucially, the second will was not even witnessed by her. There is however no legal requirement that a will must be prepared, or even witnessed by lawyers. As such, irrespective of the practice, in view of the legal position on the issue, the non-witnessing by DW2, despite being the preparer of the second will by itself does not necessarily affect the validity of execution or give rise to a suspicious circumstance concerning its making.

[35] The deceased did not understand English, the language in which both the wills were written. The one who translated the second will to the deceased in Tamil was DW3. I do not agree however with the contention of the plaintiff who doubted that the same was correctly translated to the deceased on the basis purely of the inability of DW3 when questioned during cross-examination to explain the meaning of the words 'codicil', 'testamentary disposition' and 'executrix' which appeared in the second will. These are technical legal terms which even lawyers who do not concern their practice with the preparation of wills may not fully understand. In my evaluation, based on his answers in court, DW3 could be considered to be generally capable of understanding English, in terms of reading and speaking the language, at any rate to have been able to explain the key contents of the second will to the deceased. During re-examination, DW3 answered as follows:

Ang: When you say that you explained to your uncle, what do you explain to him?

Subramaniam: What is the content of the will ...The vacant land mukim in Plentong, 2 terrace houses and FD account. That's all.

[36] This evidence was further supported by that of the other witness to the second will, namely DW4, the brother of DW3. During re-examination, DW4 responded thus:

Ang: Tadi Encik Ettikan ada katakan bahawa abang Encik Ettikan yang terangkan kepada mendiang Encik Kandasamy. Boleh beritahu kepada Mahkamah apa yang diterangkan kepada Encik Kandasamy?

Ettikan: Sebidang tanah dan 2 biji rumah dan wang simpanan tetap kepunyaan Mr Kandasamy telah diwasiatkan dalam will itu Yang Arif.

[37] In my view, the explanation of the essence and substance of the second will by DW3 would be sufficient under the circumstances to show that the deceased had full knowledge of what he was said to have executed, and by itself would be incapable of giving rise to a form of suspicion doubting the execution of the second will.

[38] Notwithstanding the above however, there are various aspects concerning the second will, apart from the issues mentioned above, much of which related to apparently conflicting testimonies by the witnesses for the defendant, that in my view require deeper analysis. I identified five issues. The first is the contradiction between the assertion by DW2 (the lawyer) who claimed not to have done any work for the deceased before the preparation of the second will (who, according to DW2, was a walk-in client to her firm without appointment to instruct the preparation of the will) and she only met him once before his passing on the one hand and that of DW3 as well as that of the defendant herself who both testified that the deceased knew and was familiar with DW2, on the other hand. Secondly, there was conflicting testimony of DW2 who stated that she did not attest the second will because the deceased could not come to her office but according to the defendant, DW2 visited the deceased at home subsequently. It is never easy to rationalise such contradictions, but it did appear that DW2 tried to give the appearance of unfamiliarity with the deceased that would, so she probably thought, be more consistent with her not witnessing the said execution of the second will.

[39] The third issue however provided further evidence of DW2's deeper involvement in the matter despite the attempt at distancing herself from the second will vis a vis its execution. DW2 testified that post the passing of the deceased, she had accompanied the defendant and her son ('DW6') to the Ulu Tiram branch of Public Bank and that the bank had requested DW2 to give a written guarantee in respect of withdrawals of fixed deposits which were in the name of the deceased. The reason for the request, as confirmed by DW2 was that the withdrawals were allowed to be made on the basis of the second will

prepared by her. Apart from this naturally means that DW2, as a result of providing the guarantee to Public Bank now had a clear interest in ensuring that the second will was not found to be invalid, and at the same time making her much less of an disinterested witness of fact, it is in my view in the first place very unusual for a lawyer who prepares a legal document being made to guarantee bank withdrawals for another party on the basis of the said document. This does not reflect industry and business practice and certainly does not represent the law. Common sense and logic will dictate that such guarantee would not be necessary if the original documents are available, and thus would perhaps only be required in the exceptional situation where the validity of the originals is itself doubted without additional support. And even then, to get the lawyer who prepared the document to provide a guarantee is quite unprecedented. More glaring is the fact that DW2 was willing to sign the guarantee even though she did not witness the execution of the second will. In other words, she prepared the second will, had (both on her and her firm's part) nothing to do with its execution (which is incidentally the most crucial part), but was willing to abide by an unusual request to provide a personal guarantee in effect, on the validity of the same. This, in my judgment, constitutes a strong suspicious circumstance that brings into question the due execution of the second will. In her evidence, however, DW2 did not appear to consider her signing the guarantee to be out of the ordinary. Even her answer to the question during cross examination on whether she agreed that if the second will were to be subsequently found to be not valid, she would be liable to the bank in view of the guarantee, was unconvincing as it was unsatisfactory, for she, as DW2, testifying as an experienced lawyer, merely said 'I'm not very sure about that'.

[40] And that is not all to this unfortunate episode of family dispute and sibling rivalry. There are two other aspects that suggest the presence of suspicious circumstances surrounding the making of the second will. In her bid to challenge the grant of probate in respect of the first will, the defendant entered a private caveat against the said property. The rationale for the defendant's application for the entry of private caveat dated 18 July 2013 (as supported by her statutory declaration of even date) made by the defendant was curiously however not stated to be based on the second will which was supposedly already in existence by then (the second will being dated 14 February 2013) and more importantly, despite the defendant's knowledge of its contents. This is especially unusual as it is curious and certainly suspicious since if it was true, as she had admitted, to having knowledge of the contents of the second will which clearly made the defendant the sole beneficiary of all the assets of the deceased, the second will should have been the plain and obvious basis for her lodging the private caveat instead of stating in the Form 19B the general allegation that she had contributed money to the purchase of the said property way back in 1973. Patently suspicious, this raised the likelihood of the second will never having been made by the deceased at all.

[41] The other aspect concerns the evidence of DW6 (the youngest brother), who although did not appear to be directly involved in matters concerning the execution of the second will, was nevertheless a key figure in this dispute. Police reports had been lodged by the brothers against one another. DW6 reported that the plaintiff had assaulted him. The plaintiff separately complained that DW6 tried to commit forgery to withdraw deposits belonging to the deceased. The true reason for the animosity is unclear. For the purposes of this case however, the plaintiff alleged that it was DW6 who had orchestrated the making of the second will to ensure the assets of the deceased would be distributed to him by the defendant. The visit to Public Bank to effect withdrawals too involved DW6, thus prompting the plaintiff to suggest that he was there to secure cash withdrawals meant for the defendant (pursuant to the joint FD account's right of survivorship clause benefiting the defendant following the death of the deceased) and to personally benefit therefrom. PW6, the brother of both the plaintiff and DW6 testified that the defendant's joint ownership of the property with PW6 previously had now been transferred to DW6. Indeed, according to DW6's own evidence, he had benefitted from the transfer of various properties into his name from what were previously in the name of his mother, the defendant. The defendant explained however that this had been done because her youngest son was the one who was taking care of her.

[42] Whilst such transfers in favour of DW6 may well be nothing but a reflection of an almost classic expression of maternal love to the youngest son who after all was taking care of his elderly mother, the significance of his testimony vis a vis the suspicions is that it contains contradictions, and most notably, even when tested against the evidence of other witnesses for the defendant. These included his evidence that the temple on the said property was built solely by the deceased, despite the testimony of the defendant herself to the contrary; that DW2, the lawyer never visited the deceased in the family home despite DW2 and the defendant herself confirming otherwise; and crucially, DW6's specific and brazen denial that he went to Public Bank with his mother, the defendant and DW2. This is of course flatly contradictory to what the defendant, DW2 as well as the Public Bank officer ('DW1') had testified. Such contradictions and inconsistencies which were not in any way clarified by the defendant, plainly do not advance the case of the defendant, and adds to the growing skepticism and suspicions surrounding the making of the second will.

[43] One other point concerning the second will is noteworthy. The last clause in the will contained a statement that the deceased deliberately did not make any provisions to any beneficiaries who may be entitled. The defendant, as the propounder of the second will did not offer any evidence why the children of the deceased, all four of them, are excluded, but that the

distribution was designed only for the spouse who was already 60 by then. The evidence instead suggests the likelihood that a disposition of all properties previously in the name of the deceased to the defendant would for all intents and purposes mean that they would soon end up in the name of the youngest son, DW6. I should emphasise that it is for the defendant in this context to ensure the conscience of the court is satisfied as to the clarification and removal of suspicious circumstances. *Sarkar on Evidence* (18th Ed, Reprint 2014) Vol 1 at p 1552 has this to say on suspicious circumstances:

> Will — Suspicious circumstances. — When there are suspicious circumstances regarding the execution of the will, the onus is also on the propounder to explain them to the satisfaction of the court and only when such responsibility is discharge, the court would accept the will as genuine. Even when there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the court. *Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the disposition made in the will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such as case, the court would naturally except that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator.* (*K Laxmanan v Thekkayil Padmini & Ors* (2009 2 SCJ 354 (361); AIR 2009 SC 951). *Whether a will is surrounded by suspicious circumstances or not is essentially a question of fact. Execution of a will must be held to have been proved not only when the statutory requirements for proving the will are satisfied but the will is also found to be ordinarily free from suspicious circumstances …* (Emphasis added.)

[44] In my judgment, the totality of evidence have starkly revealed what could be considered as overwhelmingly suspicious circumstances concerning the making of the second will. These include questions on the true extent of the involvement of DW2 in the making of the second will despite not being a witness, her willingness to accede to a rare request to provide a personal guarantee on the strength of the second will, the unexplained non-reference to the second will in the private caveat application by the defendant, the uncommon clause in the second will expressly excluding disposition to any of the testator's children, and the obvious and many discrepancies in the testimony of DW6 (who could well be the true beneficiary of the second will) when tested even against the defendant's other witnesses. None of these was satisfactorily explained. Most were not even explained at all. Given the failure and inability of the defendant to even partly dispel the suspicious circumstances, the inescapable and irrefutable conclusion must therefore be that the defendant has on a balance of probabilities not proven the validity of the second will. The second will was plainly not free from all suspicious circumstances, instead appeared contrived and thus manifestly cannot validly be accepted as the last will of the deceased.

CONCLUSION

[45] In conclusion, in my judgment, the deceased died intestate, for neither the first will nor the second will could under the law be considered as the last will of the deceased in light of the foregoing reasons that I have discussed. Accordingly, I dismiss the claim of the plaintiff and at the same time dismiss the counterclaim filed by the defendant.

Claims dismissed.

Reported by Kanesh Sundram